

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

1-6-78

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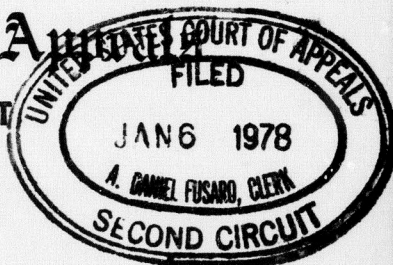
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P/S*

To be argued by
EDWARD S. RUDOFSKY

United States Court of Appeals
FOR THE SECOND CIRCUIT

Doc't at No. 77-6167



ROBERT A. LENNON,

*Plaintiff-Appellee-
Cross-Appellant,*

—against—

UNITED STATES OF AMERICA,

*Defendant-Appellant-
Cross-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-6167

ROBERT A. LENNON,

*Plaintiff-Appellee-
Cross-Appellant,*

—against—

UNITED STATES OF AMERICA,

*Defendant-Appellant-
Cross-Appellee.*

BRIEF FOR THE APPELLANT

Issues Presented on Appeal

Whether the findings of the district court with respect to the present and future condition of plaintiff's stump are clearly erroneous?

Whether the award in this case is disproportionate and unreasonable?

Statute Involved

Federal Tort Claims Act, 28 U.S.C. § 2674:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *.

Preliminary Statement

This is an appeal by the United States of America, defendant below, from a judgment entered in the United States District Court for the Eastern District of New York on August 11, 1977, awarding plaintiff Robert A. Lennon \$600,000.00 in damages for the below-the-knee amputation of his right leg as a consequence of the negligence of certain United States Navy medical personnel. Judgment was entered following a non-jury trial held on various dates between March 7 and April 4, 1977, and the rendering of findings of fact and conclusions of law by the district court (Mark A. Costantino, *Judge*) on August 10, 1977. Notices of appeal and cross-appeal were timely filed on October 7 and 18, 1977, respectively. On November 8, 1977, at the request of the parties, the district court rendered supplemental findings of fact with regard to damages. Neither decision of the district court is reported.

The ground for this appeal is that the damage award is excessive, especially in light of the district court's original determination that plaintiff failed to prove his claim for future lost earnings. Plaintiff cross-appeals on the ground of inadequacy.

The court below had jurisdiction over this action by virtue of the provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* Jurisdiction to hear and determine this appeal is vested in this Court by 28 U.S.C. § 1291.

Statement of Facts

On June 9, 1972, plaintiff, a retired United States Marine and then 21 years of age, suffered a badly broken right leg in a motor vehicle accident in Brooklyn, New York. After initially being admitted to Brookdale Medical Center, he was transferred within hours to the St. Albans

Naval Hospital, where the fractures were set. He remained an in-patient at St. Albans until December 29, 1972 (except for the period October 24—November 11, 1972, during which time he was temporarily discharged). Plaintiff was last seen at St. Albans, on an out-patient basis, on May 28, 1973 and was thereafter treated by the Veterans Administration.

Unfortunately, during the course of his hospitalization at St. Albans, plaintiff developed osteomyelitis in his injured leg and was forced to undergo additional surgery for this condition. Although the fractured bones healed and an x-ray taken prior to discharge as a St. Albans' patient showed no signs of infection, the osteomyelitis subsequently recurred and plaintiff's limb was ultimately amputated, some four and one-half inches below the knee, by Veterans Administration surgeons.

Thereafter, plaintiff filed administrative claims with the Department of the Navy and the Veterans Administration, alleging negligence in the treatment of his original injury and in the treatment of a possible refracture of his right leg in July, 1973, while he was a patient at the Castle Point, New York Veterans Administration Hospital. Both claims were denied by the agencies in question, and this suit was then commenced pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*

At trial, the plaintiff's case consisted of his own testimony (A-29-229),¹ as well as that of his treating physician, Dr. Leo J. Koven (A-234-344, 646-689), that of Richard Farrell, who testified as to plaintiff's alleged lost job prospects, (A-348-390), and that of Professor Lawrence Ritter, an economist (A-391-430), together with

¹ References are to page numbers of the Appendix.

certain documentary evidence, principally consisting of plaintiff's medical records, selected x-rays, and a chart prepared by Professor Ritter to illustrate his testimony (A-249-252, 313-316, 395-397).² The defendant's case consisted of the testimony of the principal treating physician, Dr. Thomas Nevaizer (A-407-577), that of an expert on the question of liability, Dr. Marvin Shelton (A-614-642), and that of an expert with regard to plaintiff's present and future condition, Dr. Allan Smith (A-581-608), together with the St. Albans' x-ray of plaintiff's leg referred to above (A-323-334).³

Plaintiff sought \$2,000,000.00 in damages in both his administrative claims and in the complaint filed on his behalf in the district court (A-3-7),⁴ and alleged at trial that Dr. Nevaizer had been negligent in treating his leg once it initially became infected and that the Veterans Administration personnel at the Castle Point Hospital had been negligent in diagnosing and treating a possible refracture of the leg while plaintiff was a patient there.

² Insofar as it is relevant to the issues raised on this appeal, the testimony of plaintiff and Dr. Koven is summarized and discussed in Point I, *infra* and is thus not set forth in the Statement of Facts. Similarly, the testimony of Mr. Farrell and Professor Ritter as well as the portions of plaintiff's own testimony relevant to his claim of future lost earnings, which relates solely to the issue proposed to be raised by the cross-appeal, will be discussed in that context.

³ Insofar as it is relevant to the issues raised on this appeal, the testimony of Dr. Smith is summarized and discussed in Point I, *infra*, and is thus not set forth in the Statement of Facts. The testimony of Drs. Nevaizer and Shelton relates solely to the issue of liability and is thus irrelevant to either the appeal or cross-appeal, which deal only with damages.

⁴ Relying on F. R. Civ. P. 54 (c), but ignoring the strictures of 28 U. S. C. § 2675(b), counsel for plaintiff demanded \$2,394,180.00 in damages in his post-trial submission. See "Plaintiff's Proposed Findings of Fact", p. 18.

In his initial decision below, Judge Costantino dealt solely with the question of malpractice by Dr. Nevaizer at St. Albans in regard to the treatment of plaintiff's original injury. Despite the healing of the fracture and the clear x-ray, the court found that certain deviations from the standard of care, some of which were conceded, were the proximate cause of the amputation of plaintiff's leg. See Findings of Facts nos. 4-6 and "Conclusions as to Liability" (A-12-15). On appeal we do not challenge these findings.⁵

The district court went on to hold that plaintiff was entitled to be compensated for his future medical expenses and his pain, suffering and other general damages, and awarded plaintiff \$600,000.00 (A-15). The parties have stipulated that the anticipated future medical expenses amount to a total of \$25,000 over plaintiff's lifetime, on the basis of the testimony that plaintiff is likely to incur

⁵ With respect to the Castle Point Hospital claim, at trial, counsel for plaintiff stipulated that, if called as a witness, Dr. Maureen Debbas, a Veterans Administration radiologist, would have testified that she had read the x-rays referred to in plaintiff's Veterans Administration medical records (Plaintiff's Exhibit 5) and that her reports with regard to those x-rays, which indicated that plaintiff neither fractured nor refractured his leg after leaving St. Albans, accurately reflect Dr. Debbas's interpretation of the x-rays in question (A-578-580).

Plaintiff claimed that Dr. Debbas was, in some unexplained way, negligent in reading these x-rays. This claim was premised on the fact that two weeks after the date upon which plaintiff asserted he fractured or refractured his leg a consulting Veterans Administration orthopedist diagnosed a "possible refracture" of the limb (A-285-286). Plaintiff's expert, Dr. Koven, admitted, however, that physicians often disagree as to the interpretation of x-rays without any malpractice occurring (A-338-340) and, in any event, plaintiff made no attempt to show a causal relationship between the alleged failure to diagnose and any damages.

Judge Costantino did not make any findings of fact with respect to the Castle Point claim. We do not understand the plaintiff to be cross-appealing on this ground, however.

expenses of "several hundred dollars" per year for 46 years and to expend \$2,000.00 for a necessary stump revision (A-308). There is no agreement or finding as to the present value of the future medical expenses. The balance of the verdict, at least \$575,000.00, was awarded as general damages (A-15, 19-21).^{*}

In the initial decision below, Judge Costantino did not discuss at any length how he computed the enormous verdict, nor did he make findings of fact as to plaintiff's present or future condition. Subsequently, however, after the appeal and cross-appeal had been filed, the parties jointly applied to the district court for supplemental findings of fact with respect to damages and the court entered such findings on November 8, 1977 (A-19-21).

In his supplemental decision, Judge Costantino refrained from indicating how he had arrived at the sum of \$600,000, but did set forth his findings as to plaintiff's past, present and anticipated future conditions as follows:

1. Prior to the time of the amputation, plaintiff was a normally active young man who played baseball, swam, played football, played basketball, went

^{*} The district court declined to award damages for loss of earnings, holding "[t]he evidence introduced to establish plaintiff's loss of earnings was speculative, at best. While plaintiff has proved that the range of jobs available to him is reduced he has not proved that his residual earning capacity has been diminished." (A-15). Plaintiff has cross-appealed from this finding and we will discuss the propriety of this finding in our reply brief. In order to view this case in the proper perspective, however, it should be noted at this juncture that while plaintiff failed to carry his burden of proof with respect to future lost earnings, he was compensated for the inchoate impairment of future earning capacity, principally in the reduction in the range of jobs available to him, which, though not susceptible of independent proof, naturally flows from the amputation of his leg. In New York, such impairment of future earning capacity is an element of the general damages. 7A Warren, Negligence in the New York Courts, Ch. 4, § 1.01[2].

camping and hunting, and went dancing frequently. Since the amputation, plaintiff has been able to do none of these activities.

2. Plaintiff's life expectancy is 45 years.

3. Plaintiff suffers constantly from pain, including "phantom pain," *i.e.*, pain where his foot used to be. This pain is real, rather than imaginary.

4. Plaintiff is unable to sleep through the night, because he is awakened either by the phantom pains or by his right leg bumping against his left leg. When plaintiff is awakened, which occurs approximately five times a week, he must get out of bed to soak his stump. The soaking procedure takes one and one-half to two hours. On occasion, plaintiff has been awakened more than once in one night.

5. Plaintiff's social life has been significantly diminished since the amputation.

6. Plaintiff is not able to wear his prosthesis for extended periods of time, since, when he wears the prosthesis and puts weight on his stump, the stump tears and opens and begins to drain. He must then remove the prosthesis for several days to allow the wound to close. After a few more weeks of wearing the prosthesis, the cycle begins again.

7. The tearing of plaintiff's stump is due to a condition known as cellulitis, which, as it now stands is permanent, and which is not treatable by medication alone.

8. In order to correct his present condition, it would be necessary for plaintiff to undergo a stump revision, whereby the infected tissue would be removed.

9. Plaintiff presently has a stump which extends four and one-half inches below the knee. In order to perform a stump revision, an additional inch and one-half would have to be removed.

10. Because of the length of time the infection has been present and the number of episodes of recurring infection, there is only a fifty percent chance that a stump revision would be successful.

11. If a stump revision were performed and the infection were to recur, it might be necessary to reamputate above the knee. Such a procedure would be more functionally disabling to plaintiff than is his present condition.

12. Plaintiff is presently taking sleeping pills, Valium and Percodan. Plaintiff has developed a drug dependency on Percodan.

13. The parties agree that barring any unexpected complications which may arise, plaintiff's future medical costs will be approximately \$25,000. [Page references to trial transcript omitted.]

It is, essentially, from this supplemental decision which the defendant now appeals.⁷

ARGUMENT

POINT I

The district court's findings with respect to the present and future condition of plaintiff's stump are clearly erroneous and should be set aside

As noted above, Judge Costantino found that plaintiff's "cellulitis" condition⁸ is permanent "as it now stands", though subject to correction by surgery, with a fifty percent chance of success, and, apparently, damages

⁷ As previously noted, plaintiff cross-appeals from the judgment, on the ground of inadequacy.

⁸ "Cellulitis" is an inflammation of tissue, in this case apparently localized at the end of plaintiff's stump and caused by a bacteriological infection (A-292-293).

were awarded in part on this basis.⁹ We submit that Judge Costantino clearly erred in making these findings, for plaintiff failed to carry his burden of proof, the findings are inherently contradictory and, with respect to plaintiff's future condition, totally speculative, and are contradicted by credible and concededly expert testimony by Dr. Smith.

At the outset, we note that the district judge never quite came to grips with the question of whether plaintiff has a *permanent* cellulitis condition or not. This condition, of course, is the principal factor which distinguishes the case at bar from the "typical" case involving a below-the-knee amputation.

Thus, Judge Costantino found that the cellulitis condition is, "as it now stands . . . permanent", though capable of being alleviated by stump revision. Compare supplemental Findings of Fact Nos. 7 and 8. We submit that, especially for the purpose of evaluating future pain and suffering, a condition cannot be regarded as both "permanent" *and* capable of correction, and that the findings in question are, accordingly, inherently contradictory.

Moreover, crediting the testimony of the plaintiff's expert, Dr. Koven, Judge Costantino found that "there is only a fifty percent chance that a stump revision would be successful". Supplemental Finding No. 11. Since the

⁹ On the assumption that the failure of the district court to make findings of fact with regard to damages in its initial decision below would make meaningful appellate review difficult, if not impossible, the parties jointly applied to Judge Costantino for supplemental findings in which he would set out his reasons for awarding \$600,000 in damages in this case. Since the findings in question were made in response to that request it seems fair to assume that they reflect Judge Costantino's view of why plaintiff is entitled to the award in question.

plaintiff's own witness thus established that it is as likely as not that stump revision would succeed, plaintiff, by definition, failed to carry his burden of proof with respect to the claim that the cellulitis condition is permanent.

And, it was manifestly improper for Judge Costantino to find and take into account in assessing damages, as he apparently did, the "fact" that there may be a remote possibility that stump revision to alleviate plaintiff's cellulitis condition could possibly ultimately lead to an above-the-knee amputation. Supplemental Finding No. 11.

The spectre (and, indeed, rank speculation) with regard to an above-the-knee amputation was introduced into this case by Dr. Koven's direct testimony that he could not recommend for *or against* a simple below-the-knee revision of plaintiff's stump because *if* the infection had engaged tissue above the level of the stump revision, an above-the-knee revision *might* ultimately be required (A-294-295). Plaintiff did not come forward with evidence that the infection had so spread, however, and Dr. Koven admitted on cross-examination that he had not even bothered to culture the infection (A-680-681).¹⁰

Nevertheless, Judge Costantino found

If a stump revision were performed and [*if*] the infection were to recur, it *might* be necessary to reamputate above the knee. * * * [*Emphasis added.*]

Supplemental Finding No. 11.

The judge did not, however, specifically indicate he found that there was any likelihood that more than one

¹⁰Ironically, on his direct examination, this witness had characterized similar practices (failure to adequately culture) by government physicians as malpractice (A-248, 274, 289-290).

stump revision would ever be required in plaintiff's case. In fact, any further surgery (in addition to a simple revision) would fall into the category of "*unexpected complications*" referred to in Supplemental Finding No. 13 (*emphasis added*).

Supplemental Finding No. 13, moreover, is predicated on plaintiff's own witness, Dr. Koven's, unequivocal testimony that plaintiff can reasonably anticipate future medical expenses of several hundred dollars a year and \$2,000 for *one* stump revision. Thus, it is clear that even Dr. Koven does not really expect plaintiff to require more than one stump revision and that plaintiff's damages should be assessed accordingly.

The foregoing analysis accepts Dr. Koven's testimony as accurate and deals only with the inconsistencies in Judge Costantino's supplemental findings. We must point out, however, that there was other, concededly expert, testimony in the case, that of Dr. Richard Smith, the Chief of Orthopedics at the Brooklyn, New York Veterans Administration Hospital, which Judge Costantino chose, without good reason or explanation, to ignore almost *in toto*, and which further establishes that plaintiff's cellulitis condition is not permanent and that revision of the present stump will not lead to an above-the-knee amputation in the future.

Dr. Smith was called as a witness for the government, and his qualifications as an expert were conceded (A-581). Dr. Smith explained that he has treated, and/or been consulted with regard to the treatment of, "hundreds" of amputees (A-582). (Dr. Koven, by comparison, professed no special expertise in treating amputees (A-334).) He had also been one of the surgeons who performed plaintiff's amputation in October, 1974 and was familiar with plaintiff's condition at and about that time (A-582).

Dr. Smith examined plaintiff's stump in court and testified that the plaintiff should be able to utilize a below-the-knee prosthesis "with the usual facility that most amputees of this type would have" (A-591-592). He then explained, in response to hypothetical questions, that the plaintiff's stump would require, at most, minor revision to alleviate the problems described by the plaintiff (A-593-598); he ruled out, with a reasonable degree of medical certainty, the possibility that even a "large amount" of the present below-the-knee stump would ever have to be removed unless there is x-ray evidence of an underlying bone infection (A-593-594). Dr. Smith also explained that stump revision is not considered a "major" procedure and entails only the risks normally associated with any surgery, major or minor (A-597, 600).

Although Dr. Koven actually completed his testimony *after* that of Dr. Smith, plaintiff did not come forward with evidence to rebut Dr. Smith's expert opinion, such as an x-ray indicating the actual condition of the bone. Rather, Dr. Koven simply reiterated his early testimony that the chances of a totally successful revision (*i.e.*, permanent elimination of the cellulitis condition) are fifty percent (A-682).

In the case at bar, the credibility of Dr. Smith, who was called to testify solely as an expert and whose qualifications in that capacity were conceded, is not "seriously involved," 5A Moore's Federal Practice ¶ 52.04, in evaluating the import of his testimony, especially since Judge Costantino nowhere indicated any question whatsoever in this regard, and in fact, relied on Dr. Smith's opinion in finding that a stump revision would "correct" the cellulitis condition. Supplemental Finding of Fact No. 8 (A-20). The reference in this finding to Dr. Koven's testimony is misleading, at best, since Dr. Koven obviously did not testify with the certainty with which the finding speaks; the finding is clearly based on Dr. Smith's testimony. Accordingly, this Court is not bound by Judge Costan-

tino's findings of fact with regard to the permanence of plaintiff's cellulitis condition, but may and should instead review the record in the case at bar in light of both Drs. Koven and Smith's testimony.¹¹

This testimony established that stump revision is necessary to correct plaintiff's present condition and has between a fifty and one hundred percent chance of success in plaintiff's case; thus it is clear that Judge Costantino erred to the extent that he found otherwise and awarded damages for permanent pain and suffering and other general damages in this regard. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the *entire* evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (*emphasis added*). There can be no doubt that, on the entire credible evidence in this case, Judge Costantino was mistaken in finding permanent cellulitis and his decision in this regard should be set aside.

¹¹ Ordinarily, when a witness' demeanor is vital to an assessment of his credibility, the trial judge's determination not to rely on the testimony of such a witness in finding facts is entitled to great weight upon review by the appellate courts. F. R. Civ. P. 52(a). Nevertheless, the weight to be given to a finding "varies with the character of the evidence" to which the finding relates, *Orvis v. Higgins*, 180 F. 2d 537, 539 (2d Cir. 1950) (Frank, J.), *cert denied*, 340 U.S. 810 (1950), and, "where credibility is not seriously involved," findings of fact "are not binding on the appellate courts and will be given slight weight on appeal." 5A Moore's Federal Practice ¶ 52.04. (*Emphasis added*.)

POINT II

The award in this case is disproportionate and unreasonable and must, pursuant to the provisions of the Federal Tort Claims Act, be reduced to an amount which is fair and reasonable in light of the injuries sustained

As explained above, Judge Costantino awarded plaintiff between \$575,000 and \$600,000 for pain and suffering and other general damages. We submit that such a verdict is disproportionate and unreasonable and, on those grounds, would not be sustained by the appellate courts of the State in which the tortious acts were committed, New York.¹² *Kusisto v. McLean*, 52 A.D. 2d 674, 382 N.Y.S. 2d 146 (3d Dep't 1976).

In *Kusisto*, the 18 year old plaintiff was struck by a car while operating a motorcycle. As a result of the accident, he "received a myriad of injuries, including fractures of the spinal process, contusions of the kidney and bladder and such crushing injuries to the left leg, knee and foot that the limb had to be amputated at the level of the *mid thigh*." (*Emphasis added.*) As a result, he was "completely disabled from pursuing his chosen endeavor and, in fact, from performing any activity which requires mobility because of the inability of the stump to tolerate but a minimum of pressure." Moreover, "other residuals combine[d] to deny him escape from pain, discomfort and disability." His life expectancy was 52 years and he "possessed qualities which portend a bright future for him." 52 A.D.2d at 675; 382 N.Y.S.2d at 147.

¹² It is axiomatic that damages in a Federal Tort Claims Act suit must be determined in accordance with the law of the State in which the tort was committed. 28 U.S.C. § 2674; *Hatahley v. United States*, 351 U.S. 173, 182 (1956).

Plaintiff in the case at bar, by comparison, received no internal injuries, required only a below-the-knee amputation, is not completely disabled under any circumstances or view of the evidence, requires only a minor revision of his stump so that he can fully utilize a prosthesis, has only a 26 year life expectancy and there was no finding below that he possessed extraordinary intellectual or physical qualities prior to the amputation.

In *Kusisto, supra*, the jury¹³ returned a verdict for the infant plaintiff of \$510,000 for pain and suffering and future special damages. On appeal, the Appellate Division held the verdict disproportionate and unreasonable and reversed, ordering a new trial unless the infant plaintiff agreed to accept \$400,000 as "fair and reasonable" damages. *A fortiori* the verdict in the case at bar simply cannot be permitted to stand. 28 U.S.C. § 2674; *Hatahley v. United States, supra*.

The fairness and reasonableness of the *Kusisto* result, as well as the disproportion and unreasonableness of the verdict appealed from in this case, do not have to be accepted by this Court as an *ipse dixit* of the Appellate Division, for our survey of recent cases decided throughout the country involving serious leg injuries to young adults proves the point dramatically. Thus, *see, e.g., Rouse v. Chicago, R.I.&P. Rail. Co.*, 474 F.2d 1180, 1183 (8th Cir. 1973), where the plaintiff was 31 years old at the time of the accident, suffered an amputation of his left leg five inches below the knee, offered medical testimony that further amputation might be necessary, and had already undergone 12 operations at the time of trial. A jury awarded plaintiff \$273,125, which the Court of Appeals, considering the plaintiff's life expectancy, past and anti-

¹³ "[A] trial judge's finding does not have the dignity which jury verdicts derive from the Constitution" *Orvis v. Higgins, supra*, 180 F. 2d at 539.

cipated future pain and suffering, prior earning capacity and the nature of his disability in general, regarded as "very substantial" but not "so shocking" as to require appellate intervention.

Another instructive case is *Torres v. Southern Pacific Transp. Co.*, 428 F. Supp. 1362 (D. Ariz. 1977). There, the plaintiff, 28 years of age, was trapped by asphalt, suffering third and fourth degree burns. According to the district court, he "was trapped in place for a period in excess of eleven hours", during which he "did not lose consciousness". Subsequently *both legs* were amputated, "[o]ne just below the hip and the other a few inches further down the thigh." 428 F. Supp. at 1365. His "pain and suffering under the circumstances of this case were extreme. At the time of trial, [he] was still in pain", and the district court specifically noted that "[h]e is without two legs for the rest of his life." 428 F. Supp. at 1367. The award, in addition to lost earnings and medical expenses, was \$175,000 as "reasonable compensation for [plaintiff's] pain and suffering and his permanent injuries. . . ." *Id.*¹⁴

¹⁴ In yet another case with many analogies and similarities to that at bar, the plaintiff, 16 years of age, sustained a "compound commuted [sic] fracture of the left tibia" and fibula, as well as a severed artery, which could not be repaired. "Several separate hospital confinements totalling 129 days were required", as was psychiatric treatment, "Osteomyelitis [sic] developed at the injury site" and the injured limb was at the time of trial (three and one-half years later) one and one-half inches shorter than the right leg, producing a limp. The plaintiff complained of pain "continuously". Shortly before trial his treating physician diagnosed a non-union of the fracture and a court-appointed physician reported that the leg "must be amputated below the knee and a prosthesis supplied", resulting in a functional extremity "for practical purposes". The expert "assigned a 35% permanent partial disability of the body as a whole and 90% loss of the left leg." The district court found that the plaintiff "has the mental capacity to develop skills in an occupation which would

[Footnote continued on following page]

See, also, *Raines v. N.Y. Central R. Co.*, 51 Ill.2d 248, 283 N.E.2d 230 (1972), *cert. denied*, 409 U.S. 983 (1972) (28 year old plaintiff; both legs amputated at hip; total award—\$750,000); *Brewer v. Martin*, 85 S. Dak. 356, 182 N.W.2d 327 (1970) (18 year old plaintiff struck by iron angle; required colostomy, cystostomy and amputation of one leg at hip; total award—\$400,000).

The award in the case at bar must also be viewed in the perspective of other cases involving not amputations, but more serious injuries to relatively young persons, such as the plaintiff herein. We refer specifically to decisions such as that in *Martinez v. Kaufman-Kane Realty Co., Inc.*, 74 Misc. 2d 341, 343 N.Y.S.2d 383 (Bronx 1973), *aff'd* 349 N.Y.S.2d 722 (1st Dep't 1973), *aff'd* 34 N.Y.2d 819, 359 N.Y.S.2d 51 (1974), in which the 15 year old plaintiff's plight was described as follows:

He will not have the use of his lower extremities for the rest of his life. Expert testimony described the operations, sores, ulcers, bowel troubles, urinary problems, and loss of sexual capacity, which will be part of his being the rest of his days.

343 N.Y.S.2d at 387. A jury awarded the plaintiff \$420,000.

not require full physical capabilities in the left leg", but that he "cannot perform heavy manual labor", and awarded the plaintiff \$80,000 "for all recoverable losses of any kind, including but not limited to (a) past and future loss of earnings, (b) mental anguish and pain and suffering and (c) future medical, hospital and prosthesis expenses". *Walker v. Grant*, 314 F. Supp. 442, 443-444 (S. D. Fla. 1970). For comparison purposes we note that plaintiff in the case at bar is a high school graduate (A-8), with plans to attend college (A-201), that he, too, suffered compound comminuted fractures of the tibia and fibula (A-239), developed osteomyelitis (A-13) and complains of frequent, but not continuous pain (A-107-112, 123-124). (The relatively low verdict in *Walker* was no doubt, influenced by the fact that the plaintiff had been incarcerated, "during a substantial part of the time since the injury," for possession of marihuana, 314 F. Supp. at 443.)

See, also, *Rocha v. State*, 77 Misc. 2d 290, 352 N.Y.S.2d 990 (Ct. Cl. 1974), *aff'd* 45 A.D.2d 633, 630 N.Y.S.2d 484 (3d Dep't 1974) (29 year old man rendered incapable of dressing, bathing or even urinating by himself, as well as impotent, permanently unable to walk without crutches, and in constant pain; \$300,000 awarded for "conscious pain and suffering, both physical and mental; permanent injuries; humiliation; and all other general damages"; 352 N.Y.S.2d at 1002); *Ehlinger v. State*, 237 N.W.2d 784 (Iowa 1976) (22 year old rendered *quadriplegic*; total award—\$639,000); *Morris v. Israel Bros., Inc.*, 510 S.W.2d 437 (Mo. 1974) (14 year old suffered "serious, permanent and totally disabling injuries, accompanied by dismaying pain and suffering, past, present and future, brain damage, personality change and inability to earn a living"; verdict of \$480,966 *reduced on appeal* to \$280,966); *Hampton v. State Highway Comm'n*, 209 Kan. 565, 498 P.2d 236 (1972) (\$450,000 awarded to 20 year old rendered "complete paraplegic"); *Warner v. City of Bay St. Louis*, 552 F.2d 583 (5th Cir. 1977) (\$375,000 award to 16 year old rendered "completely paralyzed from the chest down with no sexual function or control of his bowels or bladder and with a tube and sac permanently implanted to permit him to urinate" with "practically no use whatsoever of his right arm and hand and very limited use of his left hand and arm.")

Thus, while we do not, on this appeal, question plaintiff's entitlement to a substantial verdict, it is apparent that in awarding plaintiff between \$575,000 and \$600,000 in general damages Judge Costantino exceeded all proportion and reasonableness and the judgment must be reduced accordingly.

CONCLUSION

For the foregoing reasons, the judgment appealed from should be modified by setting aside the supplemental findings of fact with regard to aggravation of plaintiff's injuries by a permanent cellulitis condition and by reduction of the verdict and, as modified, the judgment should be affirmed.

Dated: Brooklyn, New York
January 6, 1978

Respectfully submitted,

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STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

DOLORES M. BYRD

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 6th day of January 19⁷⁸ he served a copy of the within
BRIEF FOR THE APPELLEE AND APPENDICES

by placing the same in a properly postpaid franked envelope addressed to:
JOSEPH KELNER, ESQ., 225 BROADWAY, SUITE 1501, NEW YORK, NEW YORK 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this
6th day of January 19⁷⁸

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 244201966
Qualified in Kings County
Commission Expires March 30, 1979